

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

BNSF RAILWAY COMPANY, ) Docket No. 21 CV 3072  
Plaintiff, )  
-vs- ) Chicago, Illinois  
TOWN OF CICERO, ILLINOIS, ) June 23, 2021  
Defendant. ) 9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - Telephonic Status  
BEFORE THE HONORABLE STEVEN C. SEEGER

## APPEARANCES:

For the Plaintiff:	THOMPSON COBURN LLP BY: MR. RENATO T. MARIOTTI 55 East Monroe Street 37th Floor Chicago, Illinois 60603
For the Plaintiff:	MUNGER TOLLES & OLSON LLP BY: MR. BENJAMIN J. HORWICH 560 Mission Street 27th Floor San Francisco, California 94105
For the Defendant:	DEL GALDO LAW GROUP LLC BY: MS. CYNTHIA S. GRANDFIELD MR. MICHAEL A. ALBERT 1441 South Harlem Avenue Berwyn, Illinois 60402

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(The following telephonic proceedings were held remotely:)

COURTROOM DEPUTY: 21 CV 3072, BNSF Railway Company  
versus Town of Cicero.

THE COURT: Good morning, everyone. This is Judge Seeger. Let's get everyone's appearances on the record if you would, please. Let's start with counsel for the plaintiff.

MR. MARIOTTI: Good morning, your Honor. Renato Mariotti on behalf of the plaintiff BNSF Railway Company. My co-counsel are also now present on the call as well.

THE COURT: All right. Good morning, Mr. Mariotti. Do you want to go ahead and -- co-counsel, do you want to go ahead and introduce yourself?

MR. HORWICH: Good morning, your Honor. This is Ben Horwich on behalf of BNSF Railway.

THE COURT: Good morning. Do we have anybody else on the line for the plaintiff? All right. Hearing no one.

Defense counsel, go ahead please.

MS. GRANDFIELD: Good morning, your Honor. Cynthia Grandfield on behalf of defendant Town of Cicero and I have co-counsel with me on the call.

THE COURT: Good morning, Ms. Grandfield. Do you want to go -- is it grand "feld" or "field"?

MS. GRANDFIELD: Grandfield.

1                   THE COURT: Field, like a -- like a field of corn?

2                   MS. GRANDFIELD: You got it.

3                   THE COURT: Got it, okay. Good morning, Ms.

4                   Grandfield. Do you want to -- co-counsel, please go ahead  
5 and introduce yourself.

6                   MR. ALBERT: Good morning, your Honor. Michael  
7 Albert on behalf of the Town of Cicero.

8                   THE COURT: Good morning. Do we have anybody else  
9 on the line for any -- any of the parties?

09:09AM 10                   All right. Well, good morning everyone. We are  
11 here today for a hearing on the motion for a temporary  
12 restraining order, preliminary injunction. I will tell you  
13 right off the bat I have read everything in detail. I did  
14 want to say thing about the schedule. Up to this point, you  
09:09AM 15 folks filed -- Burlington Northern filed a motion for a TRO  
16 on June 14th. I set that case -- I'm sorry. I set it for a  
17 hearing on June 17th. The parties requested to move it from  
18 June 17th to June 18th, which I accommodated.

19                   We found out on the afternoon of June 17th that  
20 June 18th was a brand new federal holiday, in celebration of  
21 Juneteenth, so that needed to be rescheduled so we pushed it  
22 to today so it's a little bit later than I typically go for a  
23 TRO. I like to see people promptly. Because of the request  
24 of the parties and because of the brand new federal holiday  
09:10AM 25 that was not expected, we're doing it early this week.

1               Okay. I first want to talk about where we are with  
2 the lay of the land. I'm wondering if anything has changed  
3 since BNSF has filed a motion for a TRO. I did read the  
4 Taylor Declaration, Paragraph 7, Docket Number 13-1. There  
5 was a payment that was going to be due on June 21st. I don't  
6 know what happened there. I don't know if it was paid or  
7 wasn't paid or put in escrow or whatnot. But just as a  
8 general matter, I'm wondering if anything has changed since  
9 the motion was filed, if the parties had any discussions, or  
09:10AM 10 whatnot.

11               So, Mr. Mariotti, we'll start with you, or  
12 Mr. Horwich, either one. Counsel for the Railway.

13               MR. MARIOTTI: All right. Yes. So, Judge, we have  
14 been making --

09:11AM 15               THE COURT: And I'm sorry to -- I'm sorry to  
16 interject. I have no idea who is talking so you got to  
17 introduce yourself.

18               MR. MARIOTTI: Oh, no problem. This is Renato  
19 Mariotti. And BNSF has been making payments but at the level  
20 it had been imposed in the past. So, in other words, I think  
21 more in line of the \$6,600 as opposed to ninety-something  
22 thousand dollars per month.

23               We have tried -- I mean, we've had numerous  
24 attempts before we filed to have a resolution of this matter  
09:11AM 25 and tried to, you know, find some way forward but we have

1 not. Nothing has materially changed since that time. And so  
2 there is a -- the amount due, I think we already discussed  
3 that in the briefing, is now, you know, over half a million  
4 dollars because we haven't been able to reach a resolution.

09:11AM 5 THE COURT: Got it. All right. So I want to make  
6 sure I understand the time sensitivity of it. The papers say  
7 that the Town or Village issued a notice that they were going  
8 to turn off water to the rail yard and that was going to be  
9 effective July 19th, 2021, so about a month from now. Is  
09:12AM 10 that still correct, in other words, the -- the time  
11 sensitivity here is that there's going to be a turn off of  
12 water in a little less than -- a little less than a month?

13 MR. MARIOTTI: That's -- that's my understanding.  
14 Ben, I'm sorry.

09:12AM 15 MS. GRANDFIELD: I'm sorry, your Honor. I missed  
16 that.

17 THE COURT: Just -- we'll turn to defense counsel  
18 in a second. But, Mr. Mariotti, your understanding is that  
19 it's time sensitive because roughly four weeks from now if  
09:12AM 20 the money isn't handed over, the Village is going to -- the  
21 Town is going to turn off the water?

22 MR. MARIOTTI: Right. I mean, July 19th there's a  
23 sewer service disconnection date and that's our last  
24 communication on that. We've received nothing.

09:12AM 25 THE COURT: No, no. I just want -- I just want to

1 ask because I want to make sure I understand the calendar.  
2 So, Ms. Grandfield, go ahead.

3 MS. GRANDFIELD: Yeah. I actually was just going  
4 to say that that's correct, that's a statutory notice. But  
5 just to be clear, the main issue in this case is really sewer  
6 and storm water which will be a lot more detailed so far as  
7 disconnection, what have you. But long -- long story short,  
8 July 19th is the date for a potential disconnection if  
9 there's no payment.

09:13AM 10 THE COURT: Got it. And I did not understand your  
11 point about the sewer and the storm water. Explain that to  
12 me, please.

13 MS. GRANDFIELD: So, your Honor, this is a large  
14 rail yard site as you've read in the brief and the main  
09:13AM 15 charge for this is actually sewer and storm water. It's not  
16 for water. So what we're disputing here is sewer and storm  
17 water because there's a lot of runoff on this site, it's a  
18 very high elevation compared to the rest of the municipality  
19 and it's a combined sewer and storm water because it's an old  
20 system so all of that is combined into one and that is what  
21 they're being charged this amount for that they're saying is  
22 too much basically.

23 THE COURT: Okay.

24 MS. GRANDFIELD: It's not water.

09:14AM 25 THE COURT: Got it. Okay. So, Mr. Mariotti, I did

1 read the papers in detail, like I said, so I want you to know  
2 that going into it. But just in terms of setting the stage  
3 here, why don't you give me a 60-second overview of what the  
4 case is about and -- or what the basis for the motion is? Go  
5 ahead.

6 MR. MARIOTTI: Sure. This is -- this is a case  
7 that arose from a discriminatory fee increase by the Town of  
8 Cicero in which it imposed an increase on railroads, and only  
9 on railroads, a fee that essentially dramatically increased  
10 the amount that railway BNSF is going to be paying on a  
11 yearly basis. So instead of paying, for example, \$70,000 a  
12 year, it's paying well over \$900,000 a year. So I think the  
13 first bill that came for over \$90,000 on a monthly bill was  
14 more than they had paid the entire previous year.

15 There's no notice given. There's been no -- you  
16 know, supporting documentation given or study or any  
17 reasoning that's been given regarding this from the -- from  
18 the Town and on its face it discriminates against railroads.

19 So either -- you know, I think there may be some  
20 discussion here regarding whether or not this is a fee or a  
21 tax but the ordinance is preempted as a matter of law. And  
22 if it's a fee, then it preempts it because it discriminates  
23 against rail. And if it's a tax, it violates the 4RX paying  
24 on taxes that discriminate against rail.

25 So that -- we are here essentially to get relief

09:16AM 1 because as we've discussed in July 19th, a major interstate  
2 transportation hub is going to be closed -- shutdown. We  
3 will have to vacate the premises according to the Town of  
4 Cicero and that's going to have a very significant impact not  
5 only on BNSF and its employees but on a variety of other  
6 customers that rely on BNSF.

7                   And we have tried, you know, we did not just assume  
8 based on some notice that this, you know, that -- that there  
9 was no path forward for a resolution. We've tried to have  
10 those conversations with the Town but we have -- we have not  
11 made progress and, well, obviously we need to -- we need to  
12 know what's going to happen prior to the July 19th date.

13                   THE COURT: And as I read your motion, the Town of  
14 Cicero is increasing the sewer bills from approximately  
15 \$6,600 a month to over \$90,000 a month?

16                   MR. MARIOTTI: That's right.

17                   THE COURT: Which is just shy of a 15-fold  
18 increase. Do I have -- do I have that right?

19                   MR. MARIOTTI: That's right.

09:17AM 20                   THE COURT: Okay. Ms. Grandfield, does the Town of  
21 Cicero take issue with any of the facts in the motion?

22                   MS. GRANDFIELD: I do take issue was several of the  
23 facts in the motion. I do also take issue with the idea that  
24 BNSF tried to resolve this. That's not -- I don't think  
09:17AM 25 that's a hundred percent accurate. There are some

1 discussions that are left out of the conversation -- left out  
2 of the brief that we additionally had. You'll note that we  
3 sent a response letter to BNSF and then there were a few  
4 months that went by.

09:17AM 5 During that time, we actually spoke with  
6 Mr. Mariotti, our water commissioner did, we explained about  
7 the issue of sewer and storm water runoff, we explained that  
8 it was surcharging our system, that they had changed the  
9 grading, and that it was actually causing flooding from their  
09:18AM 10 site throughout the Town on our antiquated system so I take  
11 issue with that fact.

12 I also take issue with the fact that we are  
13 targeting railroads specifically. That is not at all the  
14 case. In fact, the Town has several multi-national  
09:18AM 15 corporations within Town limits, including Citgo and Bimbo  
16 Bakeries, which own such large subsidiaries as Sara Lee. We  
17 have not -- so, in essence, we have not targeted BNSF because  
18 it's a railway or because it's a multi-national or non-local  
19 corporation. Instead, the basis for the increase in fee is  
20 the fact that we were basically undercharging them for  
21 several years because despite the fact that the Town of  
22 Cicero is an extremely -- well, not extremely, but is a large  
23 municipality in the State of Illinois, BNSF rail yard takes  
24 up ten percent of the Town's total land in the Town of  
09:19AM 25 Cicero.

1                   And basically -- and I'm going on in this but this  
2 is some of the facts that are at issue. But basically since  
3 2010 or 2011 going forward, there's always been runoff that  
4 has caused flooding but, as the Court's probably aware, just  
5 generally rainfall has increased.

6                   In addition to that, BNSF has been slowly changing  
7 their property from shards and aggregate -- in other words,  
8 gravel and soil -- to blacktop and it's been raising it  
9 several feet to the point where there are fire hydrants on  
09:20AM 10 the property where you can only see the tops of the hydrants  
11 now they've blacktopped it so much higher.

12                  So now we've got -- our system is just being  
13 overwhelmed with BNSF runoff and its combined sewer and storm  
14 water because it's an older system and it's causing flooding  
09:20AM 15 all over the place, including on major highways and in  
16 homeowners' backyard.

17                  So that's kind of the facts as to why these  
18 significant increases. The Town is just trying to find a way  
19 to deal with this incredible amount of runoff that BNSF is  
20 creating and it's not just an incredible amount of runoff,  
21 it's an incredible amount of runoff from a commercial and  
22 industrial site that is transporting all sorts of things  
23 across the country as BNSF emphasizes.

24                  So, you know, that's where we are so far as the  
09:21AM 25 facts. I think those are the primary facts in dispute. I

1 mean, I probably have gone on too long already. I can  
2 provide more detail that I've gotten from my Town engineer  
3 and what have you but those are kind of the primary things in  
4 dispute.

09:21AM 5 THE COURT: So -- and thank you for that. So is it  
6 your position that the Town of Cicero is increasing the rates  
7 here not because of the water usage but rather because of the  
8 runoff, in other words, a flood-related issue, not water  
9 usage issue?

09:21AM 10 MS. GRANDFIELD: Correct. The issue is related to  
11 the amount of storm water runoff and -- as well because it's  
12 combined. It's related to sewer. So the fee that they're  
13 being charged that they're disputing is a combined sewer and  
14 storm water fee.

09:21AM 15 THE COURT: Okay. How about -- how about the water  
16 usage, though, has Burlington's water usage changed at all?

17 MS. GRANDFIELD: As far as I know, I do not believe  
18 there has been a significant increase in their water usage.

19 THE COURT: Okay. And I'll tell you at the outset,  
20 "I don't know" is an acceptable answer. If you don't know  
21 the answer, that's fine too, but. Well, let me ask you this:  
22 How did Cicero calculate the new fee?

23 MS. GRANDFIELD: They calculated it -- my  
24 understanding was -- hold on. I'm looking at my notes here.

09:22AM 25 THE COURT: Okay.

1 MS. GRANDFIELD: It's my understanding that they  
2 did a rough calculation as to what the cost would be for  
3 essentially ten percent of the Town's sewer and storm water.  
4 They also added in there a -- there's a \$90,000 a year sewer  
5 tax that the City of Chicago has implemented which affects  
6 them. And then -- and then I believe they did add an  
7 additional amount because of the fact that they anticipate  
8 that either they're going -- again, I don't want to get too  
9 deep in the weeds here but there are some implications --

09:23AM 10 THE COURT: I'm already -- I'm already -- I'm  
11 already deep in the weeds so go ahead.

12 MS. GRANDFIELD: Okay. So the -- the MWRD, the  
13 Metropolitan Water Reclamation District, also regulates storm  
14 water. For a while, several properties were exempt and  
09:23AM 15 grandfathered in until they passed a new ordinance in 2014.  
16 So as -- any development after 2014, that property has to  
17 provide for some sort of a retention basin for storm water.

18 Now because of BNSF having been where it is around  
19 a long time and then because of the way that they have  
09:24AM 20 incrementally raised their elevation and tapped into sewers,  
21 we're not certain exactly as to how we're going to be able to  
22 resolve this and so the Town may need to actually do some  
23 sort of detention basin or something like that if BNSF  
24 doesn't, which is going to be extremely difficult and costly  
09:24AM 25 because of where the property is and, you know, it's

1 landlocked. So -- and again, just given the amount of  
2 runoff, that would have to be a really large below-grade  
3 basin so there was an additional amount added for that.

4                   And then in addition to that, I believe they made  
5 it the same as -- there's another property that is further  
6 south, Hawthorne Race Course, which has similar drainage  
7 problems now. It is actually outside Town limits but they  
8 also are being charged a similar fee -- I think the same fee  
9 per acre -- but their ultimate cost is less because they  
09:25AM 10 don't have as many acres. Lastly --

11                   THE COURT: Got it. Go ahead.

12                   MS. GRANDFIELD: One last point -- sorry -- I would  
13 say is that our civil engineers told us that because of the  
14 type of property, that it would be more appropriate for us to  
09:25AM 15 charge an area fee as opposed to some sort of -- you know,  
16 equating it to some sort of water usage fee because the real  
17 issue with this site was sewer and storm water runoff and  
18 that would just be the appropriate way to charge it in  
19 stages.

20                   THE COURT: Did Cicero perform any kind of study at  
21 all before raising the rates?

22                   MS. GRANDFIELD: They did not request a specific  
23 study; no.

24                   THE COURT: You broke up a little there, Ms.  
09:26AM 25 Grandfield. Say it again, please.

1 MS. GRANDFIELD: Oh, I'm so sorry. They did  
2 not -- I do not believe they performed a specific study.

3 THE COURT: Okay. And when you were giving your  
4 answer a minute ago, you said "they did this, they did that."  
5 Do you know who these people are? In other words, do you  
6 know who had their fingers in the pot here in terms of making  
7 the decisions and coming up with whatever analysis needed to  
8 be done to generate this change?

9 MS. GRANDFIELD: Yes. So it was a combination of  
10 the water commissioner for the Town of Cicero and the Town of  
11 Cicero's civil engineer who has his PE stamp, Novotny  
12 Engineering which the Town appoints, and then it was replies  
13 via ordinance pursuant to the Illinois Municipal Code which  
14 allows, you know, of course Illinois municipalities to set  
09:26AM 15 rates for this sort of thing sometime I think in December.  
16 It's in plaintiff's pleadings.

17 So yeah, so that was basically the decision makers,  
18 in short, would have been the water commissioner, the  
19 professional engineer, and then the board to the extent that  
09:27AM 20 they're passing an ordinance.

21 THE COURT: Got it. Well, I'm going to require the  
22 Village -- excuse me, the Town to file one week from today a  
23 list of all individuals who played a role in this decision.  
24 I think given the nature of the case, we need to get to the  
09:27AM 25 bottom of it. So one week from today, you're going to file

1 on the docket a list of everyone who was involved and the  
2 nature of their involvement. Okay?

3 MS. GRANDFIELD: Okay.

4 THE COURT: So let me ask you this: I looked at  
09:28AM 5 the ordinance and Subpart 3 was "railroad yards and rights of  
6 way," and it talked about railroads, plural. Apart from  
7 Burlington, are there any other railroads in Cicero that are  
8 affected by this change?

9 MS. GRANDFIELD: No.

10 THE COURT: Got it. So when it says "railroads  
11 shall be charged," what that really means is Burlington  
12 Northern shall be charged in effect?

13 MS. GRANDFIELD: I mean, yes. There's no other  
14 railroads or rail yards that I'm aware of.

15 THE COURT: Got it. Do you know, by the way, why  
16 the Town charges some people based on water usage and others  
17 by acre? For example, Subpart 2 is "commercial and  
18 industrial service." It says "rates for commercial and  
19 industrial service for all water consumed shall be 56.06," et  
09:29AM 20 cetera, et cetera, "per lot," but railroads are charged not  
21 by usage but by acreage. Why is that?

22 MS. GRANDFIELD: It has to do with what is an  
23 appropriate charge based on the tax on the system and the  
24 amount of runoff. And again, this is me taking what I've  
09:29AM 25 learned from the civil engineers so this is Lawyer Cynthia

1 talking about civil engineer. But it has to do with what is  
2 the more appropriate charge. And, for example, just taking  
3 the Citgo site, which is a commercial and industrial site,  
4 they do not generate as much sewer and storm water and it's  
5 appropriate to just charge them in line with their water use  
6 because they have natural drainage on their site such as soil  
7 and I believe some sort of -- either what's called aggregate  
8 or shard, which is basically gravel, so everything kind of  
9 naturally drains and you don't have as much a runoff or as  
10 much of a problem.

11 Then with some other sites like Bimbo Bakery, for  
12 example, their water usage is so high already given the  
13 nature of their business that that makes their sewer and  
14 storm water comparable and appropriate. They actually were  
09:30AM 15 paying more than BNSF in sewer and storm water prior to this  
16 latest increase even though they're a much smaller site  
17 geographically.

18 And then some of the newer commercial sites such  
19 as, you know, like a Home Depot or what have you, they would  
20 have been constructed in a later time where they would have  
21 had to put in different sort of sewer and storm water  
22 features like I was talking about with the issue of the BNSF  
23 site kind of having been around for a very long time in the  
24 old system.

09:31AM 25 THE COURT: Whose idea was it to change the rate

1 for the railroad?

2 MS. GRANDFIELD: I mean, I don't know that it was  
3 one person. I think it was a collective thing with the Town  
4 because just honestly the runoff is just so immense from  
5 there and we have historically had difficulty in reaching any  
6 sort of resolution with BNSF when we have had other issues in  
7 the past, even just a smaller issue like grass-cutting, they  
8 don't cut their grass and, you know, it was like a big to do  
9 to even get that done. So after --

09:31AM 10 THE COURT: Did you try -- did you try, though? I  
11 mean, did -- what the motion said -- I know you haven't had a  
12 chance to weigh in yet but the motion said, look, Burlington  
13 Northern was completely smacked out of the blue by this, they  
14 didn't see this coming and all of the sudden they got a  
09:32AM 15 bill -- instead of \$6,000 a month, for \$90,000 a month. They  
16 didn't give you -- they said that, look, the Town didn't give  
17 us notice of the hearing, we didn't know that this was a  
18 proposal, they just increased our rates by 15 times without  
19 telling us in advance without talking this over. Is that  
20 true?

21 MS. GRANDFIELD: Well, I don't believe that they  
22 are -- the Town is required to give any -- have any sort of  
23 hearing so I wasn't really --

24 THE COURT: That's -- that's not my question. My  
09:32AM 25 question is: Did you ever go to Burlington Northern and say

1       look, folks, we've got all kinds of problems with your water  
2       runoff, you're putting more demands on the system than you're  
3       paying for here, did you ever have that discussion?

4                   MS. GRANDFIELD: I do not know with respect to  
5       prior to the passing of that ordinance because I was not  
6       personally involved. I have not asked that specific  
7       question. I do know that I had it -- that I, myself, was on  
8       a phone call with counsel that's on the line here with our  
9       water commissioner where we did explain to them that this was  
09:33AM 10      causing an immense amount of runoff and flooding and that is  
11      why there is a break between the initial response to BNSF and  
12      then the 60-day notice is that we did agree, you know, please  
13      let's try and resolve this and work this out and we basically  
14      never heard anything back from BNSF other than, you know, we  
09:33AM 15      still don't want to pay the fee. But I know --

16                  THE COURT: When was that? When was that  
17       conversation with the water commissioner and Burlington's  
18       counsel?

19                  MS. GRANDFIELD: It was in March.

09:34AM 20                  THE COURT: You can ballpark it.

21                  MS. GRANDFIELD: Yeah. I believe -- I looked it up  
22       the other day. I didn't particularly -- I didn't  
23       particularly have it in my notes but I believe it was like  
24       mid March and then we agreed to just say anything including  
09:34AM 25       the interest rate that they're talking about until April 1st

1 and try to make a good faith basis to resolve this issue.

2 THE COURT: Got it.

3 MS. GRANDFIELD: And during that -- yeah.

4 THE COURT: I will tell you that it's a bad look  
09:34AM 5 for the Town to raise rates like this without telling  
6 Burlington anything in advance. I don't know what the story  
7 is on that but it doesn't inspire confidence in me on the  
8 decision making. I guess I don't know why they couldn't have  
9 raised this issue with Burlington in advance. And if they  
09:35AM 10 did, if the story is the Town of Cicero did raise issues  
11 about water and runoff and sewer usage and demands on the  
12 system, if they raised those issues with Burlington before  
13 the decision was made to increase the rates, that's something  
14 I'd be interested in knowing. Okay. So when --

15 MS. GRANDFIELD: Yes.

16 THE COURT: -- you respond -- when you respond --  
17 maybe there's a back story there. I don't know. I'm still  
18 learning the case. But if there's a back story there, I want  
19 you to tell me. Does that make sense?

20 MS. GRANDFIELD: Yes.

21 THE COURT: So before I talk about where we're  
22 going from here, folks, I'm going to give Burlington's  
23 counsel a chance to weigh in. You've been patiently  
24 listening and I know most lawyers chomp at the bit to say  
09:35AM 25 things so I'll give you a chance to say whatever you want to

1 say before I tell you where we're going. Go ahead.

2 MR. MARIOTTI: Thank you, your Honor. A few  
3 things. So in the -- in the filings that we made, I made a  
4 deliberate attempt not to discuss our conversations  
5 with -- with opposing counsel because I think there were  
6 arguably settlement negotiations and I didn't think that was  
7 appropriate. But since that -- the contents of those  
8 conversations have been placed before your Honor, I'll just  
9 say I strongly disagree with the characterization that's been  
10 given.

11 I mean, what I would say is, you know, it was  
12 apparent to me -- and I think it's apparent today that there  
13 really was no basis, there was no study, there was no  
14 analysis done. They didn't -- they weren't as forthcoming  
15 about that but it was fairly obvious that there  
16 was nothing -- there's no basis for this 15-fold increase.  
17 And so what I did is asked them for information for specifics  
18 so that we could evaluate what an appropriate rate would be  
19 and come back to them with a proposal and they repeatedly  
20 refused to do so.

21 Now there was a -- there's a statement made that  
22 there's some sort of agreement that there was an agreement to  
23 stay this late fee and so forth. Well, there was an  
24 agreement not to impose it for just a short period of time, a  
25 matter of weeks, but if we didn't agree to a resolution with

1       them -- within that few-week period, the late fees are going  
2       to come back so it really -- it ended up being a very short  
3       pause.

4                   And the reason that I came back to them to ask  
5       09:37AM       them, hey, what is -- is there some sort of refund process,  
6       et cetera, because I'm trying to figure out, we may have been  
7       willing to do some escrow or have some sort of alternative  
8       arrangement but -- which they weren't interested in, I don't  
9       believe, they certainly didn't seem to be. I think the  
10      09:37AM       response I received was essentially that they were going to  
11       come -- which we've outlined in the briefing, that they were  
12       going to come and order us to vacate the railway facility.

13                  Now I will just say there's been a number of  
14       09:37AM       assertions made today about, you know, the flooding and  
15       various issues. There was some illusions made, no specifics,  
16       but some illusions made during our prior conversations with  
17       them. They haven't done a study so I don't know what this is  
18       based on other than just anecdote but, you know, BNSF does  
19       have natural drainage and it's -- on its face, I mean, this  
20       ordinance does just target BNSF and its facility. It's not  
21       clear to me given that there's other facilities that are  
22       paved over -- I was at this facility, I saw some of the other  
23       large areas in Cicero when I was there, it's not -- it's not  
24       clear that that is an appropriate basis for this  
25       09:38AM       discriminatory rate.

1                   The other thing I would just say is, I understand  
2 that there's a concept that perhaps they're passing along  
3 some taxes or something like that to BNSF. It's just -- it's  
4 never been explained to us why the rest of the Town and the  
5 and the other people who are -- other people and entities  
6 that are using this system are not also paying on that same  
7 basis.

8                   So I would just say from our -- you know, as I sit  
9 here, just to be crystal clear and answer the question, BNSF  
09:38AM 10 did not receive notice of this. We have acted in good faith  
11 to try to resolve this matter and the Town's response was, it  
12 has essentially been that we have no choice but to pay the  
13 full amount and the late fees that they (inaudible).

14                  THE COURT: Got it. Okay. Thank you. So here's  
09:39AM 15 what we're going to do, folks, the motion is a motion for a  
16 TRO and a motion for a preliminary injunction. Those are two  
17 different things. Does the defendant want to file a response  
18 to the TRO portion -- in other words, putting aside discovery  
19 which we'll get to, do you want to respond to the request for  
09:39AM 20 a temporary restraining order?

21                  MS. GRANDFIELD: Well, your Honor --

22                  THE COURT: Or we can -- or we can all roll it all  
23 up into, you know, post-discovery response in light of  
24 everything. Go ahead.

09:40AM 25                  MS. GRANDFIELD: Yeah. I was going to say, your

1 Honor, I just -- I did discuss this separately with  
2 plaintiff's counsel Mr. Mariotti, not to put him on the spot,  
3 but I did say I don't see how this is a TR0 because I don't  
4 see how it's an emergency given that, you know, nothing is  
5 going to happen in the next seven days. To me, you know,  
6 obviously I would dispute that they're entitled to a  
7 preliminary injunction but that's the more appropriate  
8 motion.

9 So what I would prefer to do or what makes the most  
09:40AM 10 sense to me is to file some written response to all of it at  
11 once and then I can just approach it as a preliminary  
12 injunction because, I mean, the remedy -- the elements are  
13 basically the same. There's just that, you know, additional  
14 emergency element for a TR0.

15 THE COURT: All right. So let me ask you this:  
16 Burlington, do you want discovery?

17 MR. MARIOTTI: I don't think -- I don't think -- at  
18 this point I think any discovery would be -- would be very  
19 limited at this point; and I'll defer to the Court in terms  
09:41AM 20 of what you believe is necessary. I think the important  
21 thing for us is to ensure that the briefing and the hearing  
22 are completed sufficiently in advance of the July 19th date  
23 so that we're able to plan on that.

24 THE COURT: And are there any documents you need or  
09:41AM 25 are there depositions you want to take? And I will tell you,

1 if you take any depositions, they would not count against you  
2 on the merits, the long term, so go ahead. And maybe you  
3 want -- maybe you want to see the list of decision makers and  
4 people that -- you know, a week from today, you're going to  
5 get that, you're going to get a list of everybody who played  
6 a role in this. You know, maybe you can -- maybe you'll need  
7 to see that before you decide if you want to take the  
8 obstacle. Go ahead.

9 MR. MARIOTTI: I -- yeah, that's fine. I've  
09:41AM 10 learned a lot today that I didn't know before today about --  
11 about -- and I still think there's going to be more to learn  
12 as you suggest in the next week. I think we would like to  
13 take some depositions. We would like to get some discovery  
14 but what I am concerned about, as you could tell, is I don't  
09:42AM 15 want to do anything that is going to -- going to delay a  
16 proper resolution before that date for the sake of the -- of  
17 my client.

18 THE COURT: All right. So it seems to me that the  
19 Town doesn't need any discovery. You've got all the info you  
20 need, right, because you made the decision, am I right on  
21 that?

22 MS. GRANDFIELD: I mean, I --

23 THE COURT: Go ahead.

24 MS. GRANDFIELD: I would like some information  
09:42AM 25 about any elevation raises that they have done and if they

1       got any permits. I don't know how labor intensive that would  
2       be for them but ideally I would like that information just in  
3       general as well because obviously this is an ongoing concern  
4       for the Town but I would like that information because it  
5       affects our assessment and opinion.

6                   THE COURT: All right. So here's what we're going  
7       to do, so I'm going to order -- well, let me back up. The  
8       Village is -- excuse me, the Town of Cicero is the one  
9       creating the urgency here. They issued a shutoff notice,  
09:43AM 10       said that water is going to be turned off on July 19th,  
11       they're the one creating the urgency so I am not going to be  
12       sympathetic to any concerns by the Village -- excuse me, I  
13       keep saying the Village, I'm sorry -- the Town about  
14       expediting the schedule. They're creating the urgency and so  
15       we're going to roll.

16                   Your response is going to be due on July 1. So one  
17       week from tomorrow I want a response to the motion. In the  
18       meantime, if anybody wants to take discovery, you can take  
19       discovery. I -- I'm going to say any document requests,  
09:44AM 20       documents got to be produced within one week. Burlington's  
21       counsel, you can look at the list. If you want to take those  
22       people, that's fine. I'm not going to count any depositions  
23       that you take for purposes of the PI hearing against any --  
24       count, a deposition that you may have long term. In other  
25       words, you can depose somebody now. It's not going to

1 preclude you from deposing them later on the merits if you  
2 get that far.

3 So here's what I want to do, I want to get the  
4 response from the Village -- excuse me, the Town next week  
5 and then you guys can take discovery. I want to know  
6 by -- I'm going to set July 9th as the date for Burlington to  
7 file a reply and then I -- I'm going to set it for a hearing  
8 on the week of July 12th. I'll ask my Courtroom Deputy to  
9 throw out a date for a PI hearing that week. Maybe in the  
10 middle of the week, 13, 14, or 15.

11 COURTROOM DEPUTY: July 14th at 9:00 a.m.

12 THE COURT: Does that work for everybody?

13 MS. GRANDFIELD: That works for me.

14 MR. MARIOTTI: It works for me as well, your Honor.

15 THE COURT: All right. So does everybody  
16 understand the lay of the land here?

17 MR. MARIOTTI: We do, your Honor. Thank you.

18 THE COURT: And I will tell you, speaking to  
19 Cicero's counsel here, I'm going to give them wide latitude  
20 to take depositions.

21 MS. GRANDFIELD: Okay.

22 THE COURT: Your people have to be ready. They've  
23 got -- they're the ones creating the urgency.

24 MS. GRANDFIELD: Right.

25 THE COURT: If they want to take a deposition, your

1       people have to be available and they have to be available  
2       like ASAP so they have to drop what they're doing and sit for  
3       deposition because you've threatened to turn off the water to  
4       a rail yard so that's how we're going to do things.

09:46AM 5           MS. GRANDFIELD: Okay.

6           THE COURT: We're going to get to the bottom of it,  
7       we're going to get to the bottom of it now so they're going  
8       to have wide latitude to depose who they want.

9           I'm going to direct Burlington's counsel to be  
10       humane and reasonable. Don't take depositions you don't  
11       need, don't go on longer than you need it, be targeted, you  
12       know, be proportionate. But if you need somebody, you need  
13       to talk to somebody, you need to get some answers, you're  
14       going to get that opportunity. Okay?

09:46AM 15          MR. MARIOTTI: Thank you, your Honor.

16          THE COURT: I do want to talk about document  
17       preservation as well. Ms. Grandfield, has the Town -- what  
18       has the Town done to preserve documents up to this point?

19          MS. GRANDFIELD: Well, all the documents would be  
20       preserved because they would be part of the code of  
21       ordinances and resolutions and what have you with respect to  
22       that. I will -- I believe that all of the Town engineers'  
23       documents will be part of the Town's public record but I'm  
24       going to confirm with them today.

09:47AM 25          THE COURT: What about phones, people's phones and

1 emails, have you talked to them about that?

2 MS. GRANDFIELD: I have not but I will talk to them  
3 about it.

4 THE COURT: For example, has the Village president  
5 ever gotten a text about this issue on his phone?

6 MS. GRANDFIELD: Good question. I would say  
7 unlikely just knowing his particular habits. He would be  
8 more likely to just have a phone call and I know for a fact  
9 he's not an emailer but I will -- I will definitely check on  
10 that.

11 THE COURT: All right. So here's what I'm going to  
12 need you to do, I'm going to need a certification from you  
13 one week from today. It can be -- it needs to be signed  
14 under penalty of perjury by somebody from the Town certifying  
15 what they've done to preserve documents. It needs to include  
16 documents in the possession, custody, and control of the Town  
17 itself as well as, you know, personal phones by anyone  
18 associated with the Town, so the Village president, his phone  
19 and any of the engineers. If anybody is texting or emailing  
20 about this on their phone, that's covered.

21 I'm going to direct that you notify the Town about  
22 the preservation obligations. I want to make everything --  
23 make sure everything from day one is locked down and  
24 preserved. Does that make sense?

25 MS. GRANDFIELD: Yes. You meant one week --

1                   THE COURT: Yeah, one week from today I need a  
2 certification from -- from the Town and it needs to outline  
3 what steps the Town has done to preserve documents. I want  
4 to make sure the record is preserved; nothing's lost. I want  
5 to make sure everybody understands they've got to keep  
6 everything. See what I'm saying?

7                   MS. GRANDFIELD: Yes.

8                   MR. MARIOTTI: Your Honor --

9                   THE COURT: Did the Town have a general counsel or  
09:48AM 10 how -- or what?

11                   MS. GRANDFIELD: Yes, but we are the general  
12 counsel. Basically Mike DeI Galdo is the Town attorney and  
13 I'm here from DeI Galdo Law Group.

14                   THE COURT: Got it, okay. Well, maybe he can be  
09:49AM 15 the -- maybe he can be the certifying person. I need  
16 something from the Town certifying what steps exactly they've  
17 done to preserve documents. And I don't mean just like the  
18 agenda. I mean actually, you know -- I mean, you're telling  
19 me that there are all these problems with their runoff.

20                   There's got to be documents about that if it's a text, what  
21 they've experienced, emails, texts, whatever is in the file  
22 cabinet, something, right? So if that's the story, there's  
23 got to be documents about it. I just want to make sure that  
24 we have an understanding from day one about what the cert --  
09:49AM 25 what the preservation obligations are going to be. Does that

1 make sense?

2 MS. GRANDFIELD: Okay. Makes sense.

3 THE COURT: Does anyone have any questions about  
4 either the briefing schedule or the hearing schedule or what  
5 my expectations are for discovery in the meantime?

6 MR. MARIOTTI: No, your Honor.

7 MS. GRANDFIELD: My only question was with respect  
8 to the hearing itself, do you just anticipate that being oral  
9 argument or should I make, for example, my Town engineer  
10 available?

11 THE COURT: You know, that is an excellent  
12 question, Ms. Grandfield, and I was wondering that myself  
13 frankly. I think it would help me if you folks would let me  
14 know on the date of -- I was going to say the date of the  
15 reply. I think it would be helpful if you would let me know  
16 no later than July 12th if any party thinks there needs to be  
17 an evidentiary hearing on it. Do you see what I'm saying?

18 MS. GRANDFIELD: Okay. Yeah.

19 THE COURT: I don't know on the front end if I need  
20 to hear testimony from anybody. Maybe I can just do it on  
21 the papers probably, just do it on the papers. You know,  
22 maybe a declaration would work, I don't know, but I don't  
23 know the lay of the land yet and maybe you folks don't  
24 either.

25 I would like to know no later than the 12th on

1 behalf of the parties if any party thinks there's a need to  
2 have testimony. Does that make sense?

3 MR. MARIOTTI: It does.

4 MS. GRANDFIELD: Yes.

5 09:51AM THE COURT: And, Ms. Grandfield, for example, right  
6 now do you think that -- do you think you would need to call  
7 somebody from the Town, the engineer or someone else? Hard  
8 to say, maybe.

9 MS. GRANDFIELD: Yeah. It's a little hard to say.

10 09:51AM I think some of these questions are questions of facts and  
11 law. I'm going to try to address it with, you know, an  
12 affidavit, for example, but I just don't know because  
13 obviously civil engineering, for example, is highly  
14 specialized so, you know, I just don't know what the limits  
15 of that are. I think I won't know until I file my response  
16 but I just wanted to anticipate it.

17 09:52AM THE COURT: Yeah. I will tell you by way of a  
18 preview, Ms. Grandfield, I am interested in knowing the full  
19 story here about this rate increase. You know, the railroad  
20 paints a picture that they're being picked on essentially,  
21 that, you know, they have a vitally important facility and  
22 the Village -- excuse me, the Town is taking advantage of  
23 them by sharply increasing their rates out of the blue  
24 without any advanced warning.

25 09:53AM It leaves me wondering why the increase was there,

1 who made the decision, you know, is this some sort of  
2 discriminatory act where they're just taking advantage of a  
3 horrible railroad that needs something or is there a  
4 legitimate cost being passed on to the railroad.

09:53AM 5 So I think you need to know on the front end that I  
6 really want to hear what the explanation is for this rate  
7 increase so you're going to have to give me a pretty detailed  
8 satisfactory explanation to put me at ease here about what  
9 went down. Does that make sense?

09:53AM 10 MS. GRANDFIELD: Yes.

11 THE COURT: So you should know going in that I'm  
12 going to expect a pretty fulsome explanation from your  
13 engineering people about what the basis is and, you know,  
14 what the -- why the decision was made.

09:53AM 15 MS. GRANDFIELD: Okay. Got it.

16 THE COURT: Got it? Mr. Mariotti, is there  
17 anything else that you want to cover, anything else you want  
18 to raise, any questions, anything like that?

19 MR. MARIOTTI: I don't think so. I mean, from  
09:54AM 20 where I sit, I don't think that there's any -- going to be  
21 any discovery on -- that they would have of us. I can't  
22 imagine what that would be since we didn't know about this  
23 before -- beforehand so I think -- I don't think I have any  
24 questions on that end.

09:54AM 25 THE COURT: And that's my assumption, too. I don't

1 know but that would be my assumption as well.

2 Ms. Grandfield, is there any other topic you want  
3 to raise, any questions? And I'll say at the outset, folks,  
4 I don't think I have a monopoly and good ideas up here so if  
5 anybody has a suggestion for a different procedure how to  
6 handle things, I'm certainly amenable to listening to you.  
7 This seems to make sense to me. We've got a water shutoff on  
8 July 19th. There may be some factual issues so I think we  
9 need to get to the bottom of it, gather facts and have a  
09:54AM 10 hearing on it and go from there. But if anyone else has  
11 another idea, I'm happy to hear from you. Ms. Grandfield, go  
12 ahead.

13 MS. GRANDFIELD: That sounds like a good plan  
14 procedurally. The only other thing I wanted to add is that  
09:55AM 15 because a lot of this stuff has to do with detention and  
16 runoff that it would be helpful just behind the scenes -- I  
17 know Renato and I have talked -- to discuss if there is a  
18 possibility that BNSF could institute their own, you know,  
19 detention, or what have you, so that they could potentially  
20 not even have this runoff, which would eliminate the issue.

21 That's a really, in my mind, big difficult civil  
22 engineering problem but I just wanted to put that out there  
23 because it is a big difficult civil engineering problem in my  
24 mind so let's start thinking about it now.

09:55AM 25 THE COURT: Can I ask you a question on that,

1       though?

2                   MS. GRANDFIELD: Sure.

3                   THE COURT: So if it's a big difficult civil  
4                   engineering problem, have you talked about that with  
5                   Burlington before today, in other words, maybe before March?  
6                   I don't know if it was raised in March when the engineer was  
7                   in line but --

8                   MS. GRANDFIELD: Right.

9                   THE COURT: -- had the parties actually talked  
10                   about this?

11                  MS. GRANDFIELD: Again, I don't know. I'm not  
12                  going to represent -- I probably should know the answer to  
13                  that but I do not know the answer to that specifically so I'm  
14                  not going to, you know, represent one way or another --

15                  THE COURT: Yeah.

16                  MS. GRANDFIELD: -- so --

17                  THE COURT: It just wouldn't -- it just wouldn't be  
18                  a good look -- it wouldn't be a good look if the answer was  
19                  there's this huge problem that we've never told them about  
20                  before, right. That just -- that wouldn't -- that wouldn't  
21                  play well. So if you've raised it, I want to know. You hear  
22                  what I'm saying?

23                  MS. GRANDFIELD: Okay. Yes.

24                  THE COURT: One other thing I need from  
25                  Burlington's counsel -- and don't anyone read into this, read

1 anything into this, okay, but one thing I require for all  
2 TROs and all preliminary injunctions is a draft order just as  
3 a matter of course. You're asking --

4 MR. MARIOTTI: Sure.

09:56AM 5 THE COURT: -- to issue emergency injunctive  
6 relief. I don't know what that would look like, right, so I  
7 need to get a draft order submitted to my proposed order  
8 inbox. The email address is on my web page. And again,  
9 don't anyone read anything into that. It's a matter of  
09:57AM 10 course. This is what I'm requiring. I have TRO hearings  
11 pretty routinely so don't read anything into it.

12 Is that okay, Mr. Mariotti, can you get that to  
13 me -- maybe you can do it before -- do it on the day of your  
14 reply.

09:57AM 15 MR. MARIOTTI: For sure. We will -- we'll take  
16 care of that, your Honor.

17 THE COURT: No later than the 9th. Okay, folks. I  
18 think we've made some progress today. We got a plan going  
19 forward. Good luck with the exchange of discovery. I'm  
09:57AM 20 assuming there will be no issues on that. I'm assuming  
21 people will be proportionate and cooperative and responsive  
22 to each other. If there are any issues, you know how to  
23 reach me and I'll look forward to the materials and we'll go  
24 from there.

09:57AM 25 MR. MARIOTTI: Thank you, your Honor.

1                   THE COURT: Okay. We're adjourned. Thank you,  
2 folks.

3                   MS. GRANDFIELD: Thank you. Bye.

4 (Proceedings concluded at 9:57 a.m.)

5  
6                   C E R T I F I C A T E

7  
8                   I hereby certify that the foregoing is a telephonic  
9 transcript of proceedings before the Honorable Steven C.  
10 Seeger on June 23, 2021.

11  
12                   */s/Laura LaCien*  
13                   Official Court Reporter

14                   June 28, 2021  
15                   DATE

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